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No. 09-272

In the
Supreme Court of the United States

ATHENS DISPOSAL COMPANY, INC.
dba ATHENS SERVICES,
Petitioner,

v.

EDIXON FRANCO,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the Second District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND RALPHS GROCERY COMPANY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2, Pacific Legal Foundation (PLF) and Ralphs Grocery Company respectfully request leave of the Court to file this brief amicus curiae in support of the Petitioner.[1] All parties were notified of Amicus's intention to file this brief more than ten days before the due date. Written consent was granted by counsel for Petitioner and is lodged with the Clerk of this Court. Counsel for Respondent refused to respond to repeated requests for consent, thus necessitating this motion.

INTEREST OF AMICI CURIAE

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, Docket No. 08-1198, *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008), and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006). Because of its expertise with regard to the freedom of contract in the arbitration context, as well as its commitment to economic freedom, PLF believes its perspective will aid this Court in considering whether to grant the petition for writ of certiorari in this case.

Ralphs Grocery Company runs more than 400 supermarkets under the Ralphs, Food 4 Less, and Foods Co. banners, mostly in California but also in Illinois, Indiana, and Nevada. The company also runs warehouse-style stores under the Food 4 Less and Foods Co banners. Ralphs Grocery Company has approximately 35,000 employees, including substantial numbers in California. Ralphs asks its employees, including those in California, to agree to resolve employment-related disputes in arbitration, and therefore has a substantial interest in this Court's review of the decision below.

For the foregoing reasons, the motion of Pacific Legal Foundation and Ralphs Grocery Company to file a brief amicus curiae should be granted.

DATED: October, 2009.

Respectfully submitted,

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QUESTION PRESENTED

Whether the federal arbitration act, 9 U.S.C. § 1, *et seq.*, prohibits a court from invalidating an express class action bar in an arbitration agreement because the court finds that class arbitration is more efficient, where the class action bar does not preclude the plaintiff from vindicating his statutory rights through an individual arbitration.

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INTEREST OF AMICI CURIAE

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, Docket No. 08-1198, *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048 (2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008), and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006). Because of its expertise with regard to the freedom of contract in the arbitration context, as well as its commitment to economic freedom, PLF believes its perspective will aid this Court in considering whether to grant the petition for writ of certiorari in this case.

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Foods Co. banners, mostly in California but also in Illinois, Indiana, and Nevada. The company also runs warehouse-style stores under the Food 4 Less and Foods Co. banners. Ralphs Grocery Company has approximately 35,000 employees, including substantial numbers in California. Ralphs asks its employees, including those in California, to agree to resolve employment-related disputes in arbitration, and therefore has a substantial interest in this Court's review of the decision below.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), this Court reaffirmed that Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, to overcome judicial resistance to arbitration and that the savings clause of Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts. Applying this federal substantive law to the states, this Court held that arbitration contracts are to be construed as any other contract, not subjected to more stringent review or disfavor because the subject matter is arbitration. The Court thus confirmed the holding of *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

These matters have been settled law for 25 years. California courts, however, still scrutinize arbitration with suspicion and dislike, and invalidate arbitration contracts with distressing regularity. Most commonly, California courts invoke unconscionability principles to invalidate the contracts. However, the unconscionability doctrine is not applied neutrally among all

types of contracts, resulting in the disproportionate invalidation of arbitration provisions as opposed to other contracts. This feature of California jurisprudence interferes with the normal and proper functioning of the California marketplace, injuring businesses and consumers alike. Because employment contracts—including arbitration clauses—are ubiquitous throughout California, and because California courts are invalidating arbitration clauses at a rate far exceeding that of any other state, this case presents an important question that can be resolved only by this Court. The petition for writ of certiorari should be granted.

ARGUMENT

I

CALIFORNIA'S UNCONSCIONABILITY DOCTRINE UNIQUELY DISFAVORS ARBITRATION CONTRACTS

California's reluctance to enforce arbitration contracts conflicts with the FAA's policy of favoring arbitration. It also conflicts with the approach of other states and the federal circuit courts, which comply with the federal policy codified in the FAA. Because California's hostility toward arbitration contracts affects many millions of employees and businesses in the country's most populous state, this Court should grant the writ of certiorari to review and reverse the decision below.

This Court has recognized that the freedom to make and enforce contracts is a fundamental element of free choice and ought to be protected for that reason. *See, e.g., Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) ("[F]reedom of

contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."). With one procedurally bizarre and narrow exception, there is no statute in California, or any other state, that requires parties to a transaction to arbitrate disputes.[2] Nonetheless, arbitration frequently is described as "mandatory," by which those who oppose arbitration contracts generally mean either that (1) individuals must agree to arbitration if they wish to buy the product or continue being employed; or (2) by agreeing to arbitrate, the contract "mandates" individuals to resolve disputes by arbitration even if they later would prefer to go to court. Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 706 (2001). This Court, however, has refused to invalidate arbitration agreements solely on the grounds that an individual must take-it-or-leave-it. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the

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[2] *See Hess Collection Winery v. Cal. Agric. Labor Relations Bd.*, 140 Cal. App. 4th 1584, 1600-01 (2006) (upholding validity of Cal. Labor Code § 1164, mandating "interest" arbitration (as opposed to "grievance" arbitration) between agricultural employer and workers, which compels the parties to submit to mediation imposing a collective bargaining agreement when the parties fail to agree on the terms of an initial bargaining agreement).

employment context.");[3] *see also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118 (3d Cir. 1993) (arbitration agreements are enforceable even if they involve unequal bargaining power). *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (upholding a forum-selection clause in cruise-line ticket).

One way that individuals seek to evade an arbitration provision in a contract is to invoke the unconscionability doctrine. Unconscionability is a notoriously flexible concept. *See* Joseph M. Perillo, *Corbin on Contracts: Avoidance & Reformation* § 29.1 (rev. ed. 2002) ("Unconscionability is one of the most amorphous terms in the law of contracts."). The flexibility no doubt stems from the original purpose of the unconscionability doctrine: to protect consumers. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & Econ. 293, 302 (1975) ("Ideally, the unconscionability doctrine protects against fraud, duress and incompetence, without demanding specific proof of any of them."). However, the doctrine was not

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[3] In 2002, Senator Edward Kennedy introduced a bill expressly to restrict the FAA to nonemployment agreements. S. 2435, 107th Cong. (2002) ("A bill to amend title 9 of the United States Code to exclude all employment contracts from the arbitration provisions of chapter 1 of such title; and for other purposes."), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN02435:@@@L&summ2=m& (last visited Sept. 16, 2009). This bill has since been reintroduced and referred to committee five times, but never made it out of committee. *See, e.g.*, H.R. 2969, 109th Cong. (2005) ("Preservation of Civil Rights Protections Act of 2005 – Amends the Federal Arbitration Act to modify the definition of commerce so as to exclude employment contracts from arbitration provisions"), bill history *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR02969:@@@L&summ2=m& (last visited Sept. 16, 2009).

written to enable courts to do justice by rewriting contracts. In fact, in the official comments to Uniform Commercial Code § 2-302 (2003), the drafters explained that the unconscionability principle "is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." *See id.*, official comment 1 (emphasis added); *accord* Cal. Civ. Code § 1670.5, Legis. Comm. Cmt. (same).

While the FAA permits state courts to apply "ordinary principles of unconscionability," the FAA forbids state courts from implementing substantive state policies that undermine arbitration clauses. Moreover, "a state cannot evade FAA preemption simply by labeling procedures which are inconsistent with its substantive policies as unconscionable." Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements*, 58 Bus. Law. 1289, 1295 (2003). Similarly, this Court's arbitration jurisprudence does not permit a state to use unconscionability as a ground for voiding arbitration agreements in certain classes of disputes just because the state court believes those disputes are better handled by some other means of dispute resolution. For example, this Court held that the FAA preempts California Labor Code § 229 insofar as the state statute allowed litigation in court to collect wages "without regard to the existence of any private agreement to arbitrate." *Perry v. Thomas*, 482 U.S. 483, 484, 491 (1987) (quoting Cal. Lab. Code § 229 (West 1971)). This strongly suggests that California could not simply deem such an arbitration clause to be unconscionable and unenforceable to the extent it

prevented an employee from suing in court to collect unpaid wages. *See Gold Rush*, 58 Bus. Law. at 1295. As one commentator noted:

> [T]he United States Supreme Court surely would review state courts' unconscionability rulings to the extent necessary to prevent the unconscionability doctrine from effectively nullifying the FAA with respect to a huge class of contracts. Indeed, the Court has twice stated that state courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."

Stephen J. Ware, *Alternative Dispute Resolution* § 2.25(b), at 58 (West 2001) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 n.3 (1996)); *Perry*, 482 U.S. at 492 n.9. That is, a court may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

Nonetheless, California courts have found the unconscionability doctrine to be a valuable tool to invalidate arbitration contracts. In so doing, California has developed a deserved reputation as "hostile" to arbitration. A recent empirical analysis conducted by Stephen Broome revealed that unconscionability challenges in California succeed against arbitration provisions with far greater frequency than any other type of contract provision. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California*

Courts Are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L. J. 39 (2006). Broome identified 114 cases in which the California Courts of Appeal considered the unconscionability of arbitration contracts; in fifty-three of those cases, the arbitration provision was held unconscionable and unenforceable and another thirteen found some aspect of the arbitration provision to be unconscionable and severed it. *Id.* at 44-45.[4] Forty-eight cases upheld the arbitration contract. By way of contrast, of the forty-six unconscionability claims made outside the context of arbitration, forty-one of the contracts were upheld by the courts, while only five were struck down as unconscionable. *Id.* at 47. By targeting arbitration provisions for exceptionally harsh review under the unconscionability doctrine, California courts violate Section 2 of the FAA, which demands that arbitration contracts be considered on "equal footing" with any

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[4] Broome's survey included cases decided from 1982 to 2006. The starting date was set by California's adoption of the currently existing unconscionability doctrine in *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982). Broome, 3 Hastings Bus. L.J. at 44 n.33. Since then, court invalidation of arbitration clauses on grounds of unconscionability has, if anything, accelerated. *See Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th 447, 457 (2009); *Kim v. Francesca's Collections of Cal., Inc.*, No. B207572, 2009 WL 1016599, at *5 (Cal. Ct. App. Apr. 16, 2009); *Sanchez v. W. Pizza Enters., Inc.*, 172 Cal. App. 4th 154, 181 (2009); *Duran v. Discover Bank*, No. B203338, 2009 WL 1709569, at *7 (Cal. Ct. App. June 19, 2009); *Fuentes v. Rent-A-Center, Inc.*, No. A121673, 2009 WL 2351605, at *11 (Cal. Ct. App. July 31, 2009); *Tourangeau v. LBL Ins. Servs., Inc.*, No. G038637, 2008 WL 1952377, at *4 (Cal. Ct. App. May 6, 2008); *Stiglich v. Jani-King of Cal., Inc.*, No. D051811, 2008 WL 4712862, at *11 (Cal. Ct. App. Oct. 28, 2008); *Murphy v. Check 'N Go of Cal., Inc.*, 156 Cal. App. 4th 138, 149 (2007). No California court since *Gentry* has upheld an arbitration agreement against a claim of unconscionability.

other contract. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 36.

II

CALIFORNIA COURTS REQUIRE MUTUALITY IN ARBITRATION CONTRACTS, BUT NOT OTHER TYPES OF CONTRACTS

What accounts for the difference in the courts' willingness to invalidate arbitration contracts as unconscionable as opposed to contracts in other contexts? Mostly, the culprit is a special test that California courts apply to unconscionability claims brought only against arbitration contracts. This test—the "mutuality test"—first appeared in *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997), in which the court held that a contract that requires one party to arbitrate but not the other is so "one-sided" as to be unconscionable. *Id.* at 1532. The *Stirlin* court repeatedly labeled the contract between the parties as a "contract of adhesion," with the assumption that the label would be dispositive of the legal issues. *Id.* at 1533; *see also Kinney v. United Healthcare Servs.*, 70 Cal. App. 4th 1322, 1332 (1999) (invalidating "unilateral obligation to arbitrate"). Yet this disdain of adhesion contracts itself betrays a certain bias.

> "The contract of adhesion is a part of the fabric of our society. It should neither be praised nor denounced . . . ." That is because there are important advantages to its use despite its potential for abuse. These advantages include the fact that standardization of

> forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations, and that the drafter can rationally calculate the costs and risks of performance, which contributes to rational pricing.

Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007, 1015 (M.D. Ala. 1997) (citing *Roberson v. The Money Tree of Alabama, Inc.*, 954 F. Supp. 1519, 1526 n.6 & n.10 (M.D. Ala. 1997)).[5]

None of those advantages were even acknowledged by the California Supreme Court, however, and that court adopted the mutuality test in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th

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[5] Richard Epstein explains why the "mutuality argument" cannot be a legitimate basis for declaring a contract unconscionable:

> A could not complain if B decided not to make him any offer at all; why then is he entitled to complain if B decides to make him *better off* by now giving him a choice when before he had none? If A does not like B's offer, he can reject it; but to allow him to first accept the agreement and only thereafter to force B to work at a price which B finds unacceptable is to allow him to resort (with the aid of the state) to the very form of duress that on any theory is prohibited. There is no question of "dictation" of terms where B refuses to accept the terms desired by A. There is every question of dictation where A can repudiate his agreement with B and hold B to one to which B did not consent; and that element of dictation remains even if A is but a poor individual and B is a large and powerful corporation. To allow that to take place is to indeed countenance an "inequality of bargaining power" between A and B, with A having the legal advantage as he is given formal legal rights explicitly denied B.

Epstein, *supra*, at 297.

83, 117 (2000), announcing that arbitration agreements must contain a "modicum of bilaterality." Since *Armendariz*, more than two-thirds of the courts that invalidated arbitration provisions did so because the provisions lacked mutuality. Broome, 3 Hastings Bus. L.J. at 50-51; *see also* Michael Schneidereit, Note, *A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 Hastings L.J. 987, 1002 (2004) ("[I]n *Armendariz*, the court honed California unconscionability law into a weapon that could be used against mandatory arbitration agreements."). Indeed, in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), the California Supreme Court employed a form of the mutuality test to strike down class-arbitration waivers. In the court's view:

> [C]lass action or arbitration waivers are indisputably one-sided. "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits."

Id. at 161 (quoting *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002), *cert. denied*, 537 U.S. 1226 (2003)). The court in *Gentry* also relied on what it perceived as the one-sided nature of the contract in striking down Circuit City's class-arbitration waiver. *Gentry v. Superior Court*, 42 Cal. 4th 443, 470-72 (2007). Although some language in *Armendariz* suggests that lack of mutuality can be justified by "business realities," *Armendariz*, 24 Cal. 4th at 117, no

lower California court has yet identified a business reality sufficient to justify lack of mutuality in an arbitration agreement. Broome, 3 Hastings Bus. L.J. at 54, citing Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 81 (2005).[6] The mutuality test thus makes it significantly easier to challenge arbitration agreements as unconscionable.

Yet this Court held that "[t]he 'goals and policies' of the FAA . . . are antithetical to threshold limitations placed specifically and solely on arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 688. Given this straightforward holding, jurisdictions other than California have been unwilling to adopt a requirement of mutuality for arbitration agreements. *See, e.g., McNaughton v. United Health Care Servs. Inc.*, 728 So. 2d 592, 599 (Ala. 1998) (a mutuality approach relies on the "uniqueness of the concept of arbitration," "assigns a suspect status to arbitration agreements," and therefore "flies in the face of *Doctor's Associates*"). *See also Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) ("[S]ubstantive federal law stands for the proposition that parties to an arbitration agreement need not equally bind each other with respect to an arbitration

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[6] Some federal district courts, applying California law, will occasionally find that the mutuality requirement was met and uphold an arbitration agreement. *See Rutter v. Darden Restaurants, Inc.*, No. CV-08-6106, 2008 WL 4949043, at *9 (C.D. Cal. Nov. 18, 2008); *Rodriguez v. Sim*, No. C-08-3982, 2009 WL 975457, at *9-*10 (N.D. Cal. Apr. 10, 2009); *Ramirez-Baker v. Beazer Homes, Inc.*, No. CV-F-008-601, 2008 WL 2523368, at *6-*7 (E.D. Cal. June 20, 2008).

agreement if they have provided each other with consideration beyond the promise to arbitrate."); *In re Pate*, 198 B.R. 841, 844 (S.D. Ga. 1996) (same result under Georgia law); *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001) ("[T]he doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined.").

Meanwhile, outside the arbitration context, California courts do not demand mutuality either. *See Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1488-89 (1998) (unilateral mortgage agreement upheld because "[w]here sufficient consideration is present, mutuality is not essential"); *Hillsman v. Sutter Cmty. Hosp.*, 153 Cal. App. 3d 743, 752 (1984) (upholding unilateral employment contract where consideration requirement is properly met; a "mutuality of obligation" is unnecessary). Thus, California's "mutuality" approach to determining substantive unconscionability in arbitration provisions differs from the standard used to analyze ordinary contractual provisions for unconscionability. Under the mutuality test, the court relies on its own speculation that the arbitral proceeding itself might impede a party's ability to obtain the requested relief. In *Gentry*, the court went even further, speculating that unidentified other potential class members might find it difficult to assert their rights. *Gentry*, 42 Cal. 4th at 461 ("Some workers, particularly immigrants with limited English language skills, may be unfamiliar with the overtime laws. Even English-speaking or better educated employees may not be aware of the nuances of overtime laws with

their sometimes complex classifications of exempt and nonexempt employees.") (citation omitted).

For nonarbitration contractual provisions, California courts invalidate contracts as unconscionable only upon evidence of measurable, inevitable hardship if the disputed term is enforced. *See Phoenix Leasing Inc. v. Johnson*, No. A089871, 2001 WL 1324778, at *6 (Cal. Ct. App., Oct. 29, 2001) (invalidating provision that would have given lender $208,000 of unaccrued interest); *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 411 (1995) (invaliding landlord's attempt to appropriate a portion of the sale price of a lease); *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 83 (1991) (invalidating interest rate of 200% per annum on a secured $99,000 loan); *Ellis v. McKinnon Broadcasting Co.*, 18 Cal. App. 4th 1796, 1806 (1993) (invalidating contract that gave employer all of employee's sales commissions (which were the employee's sole compensation) that were received after the employee left the company when the sales were generated by the employee prior to his voluntary departure); *Johnisee v. Kimberlite Corp.*, No. A107341, 2005 WL 1249198, at *8 (Cal. Ct. App. May 24, 2005) (same).[7]

Because such class action waivers are upheld in most other courts, consumers who wish to sue national corporations (and their counsel) can circumvent those waivers by the simple mechanism of initiating a class

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[7] These five cases are the only ones identified by Stephen Broome where California appellate courts invalidated contracts as unconscionable outside the arbitration context. *See* Broome, 3 Hastings Bus. L.J. at 56-58. *See also Dalis v. Reinhard*, No. H031637, 2009 WL 932650, at *17-*18 (Cal. Ct. App. Apr. 18, 2009) (upholding nonrecourse provision of a promissory note).

action lawsuit in California. They need only to find a plaintiff in California to take the lead and file suit in state court, and then, once the lawsuit is under way, broaden the class action to include plaintiffs from around the country. *See* Aaron C. Gundzik & Rebecca Gilbert Gundzik, *Will California Become the Forum of Choice for Attacking Class Action Waivers?*, 25 Franchise L.J. 56, 59 (2005). Thus, although California consumers and businesses are most obviously affected by the California courts' refusal to enforce class action waivers in arbitration, the true impact is national in scope and warrants this Court's review.

III

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE FAA VALUES FREEDOM OF CHOICE OVER JUDICIAL "EFFICIENCY"

Relying on *Gentry*, the court below placed a very high value on the efficiency of resolving the wage-and-hour disputes on a classwide basis. *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277, 1299 (2009) ("[C]lass treatment would be more practical than individual actions, regardless of whether the claims are adjudicated through arbitration or in the trial court."). But this Court has observed that freedom of choice, and not efficiency concerns, animates the Federal Arbitration Act. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (FAA was designed "first and foremost . . . to enforce agreements into which parties had entered, and we must not . . . allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.").

Where a court coerces contracting parties to act in a way outside their agreement, it makes no sense to speak of this as economically efficient. Coercive policies deprive the contracting parties of their judgment, to benefit outsiders, whose goals are thereby deemed more worthy. But if the desires of the contracting parties are to be disregarded, then the determination of whether a decision is efficient for those parties is unnecessary and senseless. What attorney Roger L. Carter writes of coercion in mediation is equally true of any form of coercive arbitration:

> If a party is not free to make a small offer—or no offer at all—in mediation, that party has lost, rather than gained, autonomy . . . . Judges must recognize that the parties—not the court—own the dispute.
>
> . . . .
>
> Any contrivance that works against this right deserves condemnation. . . . [W]e err if we see docket clearing as a primary goal of any form of ADR. Mediation processes should be designed to improve the quality of settlements. Any attendant increase in the quantity of settlements ought to be seen as a secondary benefit.

Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. Disp. Resol. 367, 395. Prioritizing the political goal of increased quantity of dispute resolutions over the litigants' own interest in the quality of those resolutions jettisons the desires of the litigants

themselves, and thus cannot qualify as economically efficient.

The Second Circuit's resolution of *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), was therefore correct and instructive here. In that case, the court overruled *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975), which had allowed arbitration cases to be consolidated despite the failure of the parties to agree to such a procedure. The *Nereus* court held that this was justified by "the liberal purposes of the Federal Arbitration Act," which "require that [it] be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings." *Id.* at 975.

The *Nereus* court relied on the earlier decision of *Robert Lawrence Co., Inc. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960), which held that the FAA required courts to "promot[e] arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars." But in *Byrd*, 470 U.S. at 220, decided in 1985, this Court rejected the proposition that the FAA's overriding goal is to promote speedy resolutions of disputes: rather, *Byrd* made clear that the goal of the FAA is "to enforce agreements into which the parties had entered," whether or not those agreements promote speedy resolution. Thus, in *Boeing*, the Second Circuit overruled *Nereus*, noting that "the FAA was intended merely to assure the enforcement of privately negotiated arbitration agreements, despite possible inefficiencies created by such enforcement." 998 F.2d at 72. While the Second Circuit may consider this outcome inefficient, that outcome is in reality efficient,

if it enforces the actual desires of the parties. And it is the desires of the parties, not concerns over economic efficiency, that dictate the policy of the Federal Arbitration Act—and of enforcing any other kind of contract.[8]

This Court has repeatedly observed that the FAA's policy favoring arbitration does not operate without regard to the wishes of contracting parties. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *accord*, *Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."). This is correct, but it should not be seen as a choice between competing values of autonomy or economic efficiency. In fact, those values necessarily harmonize; both are best pursued by respecting the right of individuals and firms to make transactions as they see fit, and holding them to the contracts that they sign.

CONCLUSION

The California courts consistently hold arbitration agreements to a different standard when it comes to unconscionability, and the decision below represents the latest, and most extreme, example. Six years ago,

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[8] In *Byrd*, this Court held that parties to an arbitration agreement could not force other parties to arbitrate issues not contemplated by the agreement even if those issues were pendent. 470 U.S. at 217. The same principle bars coercing pendent parties into an arbitration against their will, or consolidating potential or existing disputes against the parties' will. *Boeing*, 998 F.2d at 74.

then-Justice Janice Rogers Brown explained that "this court appears to be 'chip[ping] away at' United States Supreme Court precedents broadly construing the scope of the FAA 'by indirection,' despite the high court's admonition against doing so" and "urge[d]" this Court "to clarify once and for all whether our approach to arbitration law comports with its precedents." *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1095 (2003) (Brown, J., concurring and dissenting) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). This Court remains the only recourse to reestablish the validity of arbitration agreements in the nation's most populous state.

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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